Liabilities of the Carrier for Loss of Goods

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LIABILITIES OF THE CARRIER FOR LOSS OF GOODS

BY

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Mr. Wyman needs no introduction to the legal profession in this country. Since the publication of his work on Public Service Corporations, he has been recognized generally as the master of this subject; and his experience recently in handling rate cases for railroad systems renders him particularly well qualified to write on any matter connected with carriers. He thus speaks in respect to transportation not only with the authority of one who has long been a student of the subject in the investigations connected with his work as a professor and writer, but also from the experience of one who has had, as a lawyer in practice, much to do in hundreds of cases with various phases of the problems which he is discussing.

He is author of "Railroad Rate Regulation," "Public Service Corporations," Administrative Law," "Control of the Market," "Restraint of Trade," "Mortgage Securities," "Public Service Cases," "Jurisdictional Limitations Upon Commission Action," "A Solution of the Trust Problem," "State Control of Public Utilities;" "Monopolies," in Cyclopaedia of Law & Procedure, "Equity," in Encyclopaedia of Government & Law, "Public Service Companies," in Modern American Law, "Unfair Competition by Monopolistic Corporations," in the Annals of the American Academy; and various articles in the Harvard Law Review, Yale Law Journal, Columbia Law Review, and the Green Bag.

Mr. Wyman has within a few years returned to his practice at the Massachusetts Bar, to which he is now devoting the whole of his attention, having previously confined his activities as an attorney at law, while he was for ten years a Professor in the Harvard Law School, primarily to those of a consulting counsel in corporation matters. In the course of his career he has not only had charge of many courses on the subjects in which he is known as an expert in the Law School of Harvard University, the Chicago University Law School, the Department of Economics at Harvard and the Department of Engineering in its Scientific School, but he has also acted as draftsman of a Public Service Commission Bill, as investigator for the Directors of the Port of Boston, as counsel for the National Civic Federation, and as counsel in matters for and against several railroad systems and many other public service corporations.

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THE COMMON CARRIER AS A BAILEE

The responsibility of the carrier for failure to get through to the consignee the goods which have been intrusted to him in as good shape as they were in when first delivered to him by the consignor has traditionally been treated under the topic of Carriers along with the subject of Bailments. Abstractly carriage is simply one form of Bailment, as the carrier takes possession of the goods from the shipper under an arrangement to transport the goods in accordance with the responsibilities imposed by law. To be a carrier one must not merely take possession but must also undertake transportation. If the goods are simply to be held at a wharf in storage until a ship arrives, this is warehousing, not carriage; for although possession is taken, no transportation is involved. On the other hand, where goods are moved without possession being taken there is no carriage, as where a through railroad train is hauled across a bridge by a switching engine belonging to the bridge company. A carrier as thus defined is, however, simply a bailee with the responsi-

bilities pertaining to bailment generally—no more, no less. It is only when he is found to be a common carrier that his liabilities for losses at law become abnormal—making him practically an insurer.

A common carrier is one who undertakes to carry for all who seek his services, as an expressman does who takes his stand at a railroad station to solicit business. On the other hand, one who loads his ship for a special voyage for a particular charterer is not acting as a common carrier. Only those who make a profession of being carriers for hire are held to be doing business upon a public basis as common carriers. But those who engage in the business casually or who take goods as a favor gratuitously are not rated as common carriers. These tests go back to the time when those who undertook services vital to the public were held to responsibility beyond that resting upon people generally. And carriage thus conducted has throughout the history of our law been held to be peculiarly affected with a public interest.

COMMON CARRIERS MADE INSURERS

Thus in our earliest law reports we find the carrier who regularly took goods of others to the market town held liable for their loss, although he was overpowered by highwaymen. He had assumed to carry them through; and according to mediaeval notions his story, however much credited, constituted no excuse at law for his failure in his undertaking. There was nothing shocking to the mediaeval mind in holding a man absolutely liable for his failure to protect the goods which he had undertaken to de-

liver. It is doubtful, however, whether the doctrines then current would have gone to the extent of holding him liable for loss beyond the scope of the undertaking, such as accidental fire, as he is in modern times. Indeed, it remained for Lord Mansfield in the latter part of the eighteenth century to utter the portentous words—"A Carrier is in the nature of an insurer."

As the law has stood for some time, therefore, the carrier of goods is absolutely liable for their loss or for injury to them. This is applied strictly to the case of the common carrier of goods; but it is not extended to other services, no matter how similar to carriage. The common carrier of goods is thus liable as an insurer, whether the loss or injury is his fault or he contributes in any way to the loss. A shipmaster has always been held liable for an accidental loss of his vessel which has been cast away, although he could not be said to be in any way to blame. It should be said, however, that there are certain exceptions to this absolute liability in the law as it stands, most of which can be traced back to an early time when they had a place in the general scheme. These are worth listing before the discussion of them is begun: (1) act of God, (2) seizure by public enemies, (3) vice of the goods and (4) interference of a party in interest.

When Possession Is Taken

The question is often raised as to whether the carrier in a case under consideration is under any responsibility whatsoever as such. Clearly, until the

goods in question come to his possession he is as yet no carrier. Thus if the shipper is getting the goods together for shipment at a private siding the railroad has no responsibilities in relation to them at that stage. Even if the carrier is properly offered the goods, and wrongfully refuses to take them, his liability is not that of the bailee of goods, but of a carrier defaulting in his obligation to receive. So if after such a refusal the owner leaves the goods exposed to theft, he cannot hold the carrier for their loss. You do not show the bailment which is essential to the situation in carriage unless you can prove a taking of possession from the shipper by the carrier. And unless carriage is going on, no question of the liabilities for losses pertaining to that situation can arise.

The delivery of goods to the carrier for shipment may be actual or constructive, but there must be a delivery and acceptance of the goods. Thus delivery to an expressman out collecting is delivery to the company, since the goods have actually been received in due course of business. On the other hand, even the deposit of goods at a railroad station upon a platform provided to receive them, though they are so deposited for immediate shipment ready to be loaded upon the freight train when it arrives, is not, in the absence of special custom, enough to render the carrier liable. But where goods are taken out of the vehicle in which they are brought to the conveyance of the carrier by a crane operated by the carrier, the carrier's responsibility is held to begin as soon as the goods are attached to the tackling.

SPECIAL ARRANGEMENTS AFFECTING CARRIAGE

Where the customer is dealing with an employee, it is sometimes difficult to say whether the servant is undertaking public service on behalf of his master, or whether he is agreeing to a private service in his personal capacity. Where a parcel was given to the coachman who undertook to deliver it in town, it was held that such carriage was a private matter, undertaken by the servant personally. But a person leaving a package upon the front platform of a street car, in sight of the conductor, should not expect the company to be liable, unless there has been a holding out to take for an additional price miscellaneous parcels which passengers bring with them.

If the owner of goods goes along with them and retains possession of them, the person who furnishes the vehicle is not a carrier, since he is not a bailee. In the case of a ferry, for example, the fact that the owner goes along with the goods and often retains the entire charge and management of them (as for instance where he drives a horse on the ferry-boat and manages him while on the boat), prevents the relation of carriage. The case of the circus train is also peculiar in that the keeping of the wild beasts obviously remains with the owners of the circus, who make a special contract for the haulage of their train; and the company is therefore not liable as a common carrier in case of an accident.

ACT OF GOD AS AN EXCUSE

From time immemorial a loss caused solely by the act of God has been excused, but what constitutes

an act of God has never been defined with exactness. Indeed, it is evident that the extent of this excuse has varied in the history of the law, having been formerly, very probably, more extensive than it is at present. The awful convulsions of nature are plainly acts of God. Losses caused altogether by earthquakes, eruptions, landslides, and tidal waves, to select four instances, are plainly excused. Violent storms are also plainly acts of God, such as tornadoes, whirlwinds or cloud-bursts, and extraordinary floods or the bursting of dams. And snowstorms or blizzards furnish other examples, with snow blockades and snow slides as their result. A sudden change in temperature, such as an unexpected frost, or an unforeseen period of extreme cold, constitutes an act of God, as well as warm weather and extreme heat. It should be added that the ceasing of the natural forces which are unusually manifesting themselves constitutes an act of God. Thus a sudden dying of the wind is as much an act of God as an unexpected squall; and an unusual drought is as much an act of God as a torrential rain.

From the earliest times seizure by the King's enemies has also been an excuse in public service. As a foundation for the excuse, a state of war must exist between the community to which the carrier belongs and the country whose forces have made the seizure. It makes no difference whether the foreign government waging the war is de jure or de facto; but it must be sufficiently organized to be regarded as a belligerent party in a war actually begun. The American cases chiefly relate to the situation at the

time of our civil war. It was finally generally agreed that the Confederate government was so far de facto as not only to make its forces public enemies to Federal carriers, but also to make the Federal forces enemies to Confederate carriers. On the other hand, damage caused by roving marauders does not come within the excuse. And if a carrier be robbed by a hundred men he is never the more excused.

VICE OF THE GOODS THEMSELVES

Moreover, there is an established excuse if the loss happens by deterioration or disintegration of the goods in transit, whether it is due to inherent characteristics or precipitated by external factors. If for example the loss happens by a freezing in winter or if by melting in summer there is an excuse. Likewise a loss caused by the fermentation of the molasses being carried, or by the decay of the fruit in transit, will be excused. In any case, the deterioration of the goods must be the result of natural causes. But it is not necessary to show that the loss would have occurred if the goods had not been moved. This excuse of the vice of the goods finds its chief scope in the law relating to the carriage of animals. If, notwithstanding due care of them, they injure themselves or die by accident, the carrier is not held liable.

The patron should not recover when the loss can be attributed to his own action. Thus if wrong directions for the performance of service are given, the patron cannot complain of the failure caused thereby. And if the patron conceals the true char-

acter of the service asked, he cannot complain of the loss caused thereby. Furthermore, if the patron interferes with the performance of the service, he cannot complain of any loss to which his action contributes. Thus where the shipper put hay into a stock car in violation of regulations of the company forbidding the putting of combustibles into the car, it was said that the carrier should not be held liable for a subsequent loss by fire. Similarly where a servant of the shipper accompanying stock took a lantern into the car which set the car on fire, it was held that the railroad was not liable whether the lantern was handled negligently or not.

NEGLIGENCE CONTRIBUTING TO THE CATASTROPHE

It should be noted that where human activity is a factor in the loss the carrier is liable although in no wise to blame. Thus in the case of the Chicago fire, started by negligence in a remote part of the city, the railroads were held liable for burning of goods in the freight yards. But in the Johnstown flood, caused by the bursting of a reservoir after heavy rains, the railroads were held not liable. Another comparison of two other actual cases may make this plainer. Where a vessel by failure of the wind was left helpless so that it drifted upon the rocks, notwithstanding all efforts of its master, the loss was held one for which the carrier was not liable, as it was caused solely by act of God. On the other hand where a ship while being steered in its usual course ran upon the wreck of another ship which had a few hours before been sunk in the channel by a

sudden squall, it was held that, as the act of man contributed to the catastrophe, the carrier was liable for the loss, although in no wise to blame.

Moreover, even if the damage is apparently due exclusively to act of God or other exceptional cause, nevertheless if the carrier could have foreseen the catastrophe in time to have prevented it, or could have avoided the results of it and negligently failed to do so, he will be liable. This is brought out in two well known United States Supreme Court cases. In one of them it was pointed out that if the carrier chooses the route which would very probably expose the goods to capture by the enemy, it will be liable for their capture. In the other it was pointed out that unless the carrier failed to exercise whatever care was practicable to remove the goods from a rising flood, it would not be held liable. Likewise, where an animal shows signs of sickness to such a degree as to endanger its life, the carrier should, if possible, take steps to relieve it. So, where the shipper has sent goods obviously improperly packed, it was held that the carrier should see that they are better secured.

PERSISTING DUTY TO SAFEGUARD

Where the injury may be repaired wholly or partially at the place of accident, and where such a course is peculiarly necessary to prevent further deterioration, the elements of this duty are obvious. The carrier must do what is reasonable to prevent deterioration of the goods or damage to them as a result of an accident. So if a cargo has been wet it

should be dried at an intermediate port, if that is practicable. And perishable provisions should be iced if the departure of the carrier has been delayed. And wrecked cars should be guarded if that is possible. Of course in these as in other cases, if the law throws this rather extraordinary liability of care in emergencies on the companies, they may recoup themselves by a proper charge. And clearly special instructions by the shipper not to take precautions will excuse the carrier from so doing in the absence of any unexpected delay.

Unusual circumstances may call for the stopping of performance. Thus when a horse has been made sick by being frightened by the motion of the train, the car containing it should be sidetracked upon request where this is practicable. In a more extreme case it was held lately that, where a woman traveling was taken with childbirth pains, it was the duty of the conductor to accede to her request to stop the train at a town where there was a hospital, although the train was not scheduled to stop there. To put less obvious cases, it has been held that where the transportation of peaches was stopped at a bridge which had been swept away, and the delay promised to be so long that in the weather conditions then prevailing the fruit was sure to rot before it could reach the market, the carrier had the extraordinary right, if indeed not the duty, to sell the fruit on the spot. This extraordinary law is for extreme cases; a conductor is not obliged to stop a train to enable a passenger to recover a hand bag lost out a window.

DEFAULT IN THE CARRIAGE UNDERTAKEN

Whatever the bailment involves, whether it be transportation or anything else, must be diligently performed. Of course there are many unexpected obstacles which will excuse delay in performing service. But even if the delay is excused, the duty remains to complete performance as best it now may be. Indeed, quite extraordinary steps are often required by the law for the protection of the interests of the patron in such an emergency. Moreover, by the general rule bailees are held strictly accountable for any deviation from their undertaking. What they have assumed to do for their patrons they must do in the very way that they have undertaken to do; and if they fail to perform in any way what they have undertaken, they are held absolutely liable for the time being. But here again extraordinary events may intervene; and in the unexpected emergency not only are they excused for making a deviation, but in many instances it is their duty to complete performance in some other way.

Although no certain time be promised for completion, a reasonable time will be implied. Sometimes this default is so obvious as to speak for itself. Thus the consumption of seventeen days for the carriage of goods usually taking but three days is certainly prima facie negligent. And, of course, a delay of seventy days in completing the carriage of goods, where usually but a few days are taken, could only be explained away in the most extraordinary case. Where a cattle train was stopped for ten hours upon a journey covering in all two hundred miles,

it was held to be an unreasonable delay on the face of it. So, where the usual course of transporting freight was one day, the taking of two days was held unreasonable, when the market for perishable goods was lost thereby. Granting the negligence, however, the liabilities for consequential damages where the goods themselves ultimately arrive in unimpaired condition remains to be considered more fully later on.

DEVIATION FROM THE ROUTE

In the absence of express agreement, the carrier is bound to transport the goods by the ordinary route and by the usual means of conveyance. The undertaking of a common carrier, in the absence of any special contract, is to transport the property to the place of destination by the most usual, safe, direct and expeditious route. Failing in any of these, unless prevented by inevitable accident, he is held absolutely liable for the loss. Thus, deviation may be defined in general terms as any substantial departure from the arrangement made between the shipper and the carrier. Mere delay, however, is not a deviation, unless it amounts to an abandonment of the contract or is so gross as to indicate departure from the undertaking. Deviation is any dealing with the property taken in some way not authorized by the patron, but such intermeddling is not held to be the tort of conversion although many of the consequences of a trover flow therefrom for the time being. All this is governed by the same principles as where in a bailment of a horse to drive from A to B, the hirer

drives to C; for in such a case the bailor could hold the bailee liable if the horse were killed by lightning.

Carriers receiving property for transportation plainly make a deviation from their undertaking by forwarding the goods by a route different from their undertaking or by forwarding property to a station other than that agreed upon. Indeed, it is equally a deviation to forward by rail if water is specified, or by water if rail is specified. It amounts to a deviation to forward the goods to the specified destination by an indirect route, the question whether the indirect route is outside the contemplation of the parties being a question for the jury. Where there is a fair choice of routes it will be assumed that it is left to carrier to choose according to ordinary course of business; but if the carrier chooses a more dangerous route he is liable. For a ship to call at a port not announced as a port of call would be a deviation; but if driven to take shelter there by stress of weather the case would be different.

JUSTIFICATION FOR FAILURE TO TRANSPORT

It sometimes happens that there is a mass of business which cannot be handled within reasonable time. A wholly unexpected press of business is held an excuse for refusing to undertake further service, provided that the company has exercised due diligence in providing adequate facilities. Following these cases, the law for this situation is that where sufficient equipment has been provided to meet expected business, and by reason of unexpected demand prompt service cannot be given, there is an

excuse for such unavoidable delay. This, however, is limited to cases where, when the business was accepted, it was not known that there was impending this extraordinary pressure of business. But pressure of business resulting from lack of proper means of transportation cannot be an excuse for delay. Where this unexpected press of business will excuse the railroad for failure to move promptly all freight it has taken, it should usually normally move the freight on hand in the order of its receipt. But in extraordinary circumstances, it may postpone a later shipment for an earlier, as perishable freight for non-perishable, regardless of the order of acceptance.

The case of strikes presents a difficult situation, which has not yet been satisfactorily worked out. In so far as the operations of the company are prevented by the violent action of the strikers after leaving the service, or the violence of sympathizers, with which the public authorities have not been able to cope, delays are excusable until peaceful conditions are restored. Where, however, there is delay or damage caused by the employees quitting work, the mere fact that the company has not sufficient men to perform the services at its disposal, is according to the authorities apparently no excuse. But it would seem that if the company is not lacking in diligence in meeting the situation, it should not be held liable. It might be added that, since strikers however violent are not enemies, the carrier is liable if they destroy the goods. Thus, as the law stands, their interference is a defense for not getting the goods

through promptly; but it is no excuse for not producing the goods ultimately.

LIABILITY FOR CONSEQUENTIAL DAMAGES

The special liability imposed by the law upon the carrier of goods is altogether exceptional in modern law. Probably it is due to a rather late extension of the rather stringent ancient rule; and doubtless in early times a practically absolute liability for breach of the undertaking was felt to be necessary in order to prevent connivance with robbers, with which the country was infested. Then, too, there was nothing shocking to the mediaeval mind in absolute liability as such, where it was felt that a desirable end could be reached by the process. Fortunately, these notions did not persist in regard to the modern action for damages consequent upon negligence, which is altogether governed by the modern view that no one should be held liable for not doing more than his best. Indeed, the view of our time is that, even where a person is shown to be negligent, he is not thereby made responsible for damage concurrent with his negligence, unless the loss is in a true sense caused thereby.

It may also be pointed out briefly that when the negligence of the carrier is a contributing cause in the final loss, the carrier will be held liable therefor. Thus if a shipmaster sets forth in an unseaworthy vessel which is lost in a storm which a seaworthy vessel would have survived, the carrier was properly enough held liable. In this case, as in many others, the negligence may truly be said to be a cause con-

tributing to the final catastrophe. So, where a carrier left his cart for several hours at a ford in midstream, and the water rose and injured the goods while he was gone, he was properly enough held liable for such natural consequences of his negligence. And, indeed, wherever the loss is plainly proximate to the default the liability of the carrier therefor is beyond question.

ACCIDENTS HAPPENING DURING DELAYS

Where the loss is merely concurrent with a delay there is a noteworthy conflict in the authorities; it would hardly seem, however, that such a coincidence in itself establishes a cause. In one leading case goods delayed in transit were destroyed by an accidental fire at an intermediate station; and it was held that the carrier was not liable. On the other hand, where goods while delayed en route were destroyed by a flood, it was held that the carrier was liable. It may be admitted that if the delay materially increased the risk the carrier should be liable as where fruit was frozen after having been delayed in transit with winter coming on. But it would seem that—in the usual case—delay is about as likely to cause goods to escape a conflagration as not. It is therefore urged that such losses are not the result of the fault although the negligence be admitted. The authorities, however, on this point are almost equally divided.

In the case of deviation, however, there is such a departure from the fundamental obligations pertaining to the bailment that the carrier is held abso-

lutely liable for all losses contemporaneous with it, although in no wise due to it. The carrier is in such cases unhesitatingly held liable, even when the loss plainly is due to act of God. In the leading case a boat which was off its track was destroyed by a hurricane; and yet the carrier was held liable. So, if goods are misrouted, and while off the route are destroyed by a fire originating in spontaneous combustion, the carrier would be liable. When once the deviation is over, the carriers' responsibility becomes again what it ordinarily would be and the goods cannot be refused when they arrive.

WHEN CARRIAGE BEGINS

The carrier is not as to all the time of his holding of the goods liable as an insurer; he is only thus liable as a common carrier during the period of his essential obligation. Before his duties as a carrier have begun he holds simply as a warehouseman, and after his transportation may fairly be said to be completed he holds the goods again simply for storage. While he is carrying he is liable as an insurer, subject to the exceptions before noted; but while he is storing he is liable only for due care of the goods in his charge. It is during the carriage period, therefore, that the extraordinary liability of the common carrier attaches; both before and after the liability is the normal one of bailees generally. What the transit is which the carrier undertakes is therefore the important question of fact. The shipmaster takes simply from dock to dock; the expressman, on the other hand, transports from house to house.

Where the carrier is given goods to hold until forwarding orders are given, he holds the goods at first simply as a warehouseman. And so it is when the carrier is to hold the goods until some fixed time, as the opening of navigation. On the other hand, if it is left to the carrier to forward the goods at his convenience, he takes the goods at the outset as a carrier, although he does not put them in course of transit until later. And where the carrier is to blame for not forwarding the goods at the time as directed, he of course becomes absolutely liable for their loss. If anything remains to be done to the goods by the shipper before their transportation is to be begun, the carrier holds as warehouseman until that time. But where the carrier has both possession and the right to transport, he is as fully liable as though the goods were under way.

WHERE CARRIAGE ENDS

There is irreconcilable conflict among the authorities upon the question as to when the special liability of the common carrier comes to its end. Upon abstract principles it should end when the transportation undertaken may properly be said to have been completed; but there are many theories in the cases as to the termination of the special liability, viz.: (1) In some jurisidictions the end of the movement of the goods is the end of their carriage. (2) In other jurisdictions the liability of a common carrier continues until a reasonable time for the consignee to get the goods has expired. (3) In still other jurisdictions the common carrier remains liable as such

until he has given reasonable notice. (4) Some carriers must offer personal delivery before they are exonerated. In all jurisdictions, however, the extraordinary liability as a common carrier may at length come to an end, with the carrier still in possession of the goods. And during this period of custody awaiting delivery the carrier's liability becomes that of a warehouseman, viz.: a liability for failure to use due care to protect and guard the goods according to their nature.

Where the carriage involves the services of several carriers, the transit is considered to proceed without interruption. Of course, if the arrangement is found to be that the original carrier undertakes a through transit, there will be one transit, and the initial carrier will be responsible for the goods during the entire journey. The policy of the law is that some one should be liable as a common carrier from the beginning of the carriage to its end. And even in the more usual case of connecting carriage a prior carrier is not relieved of responsibility, until the subsequent carrier has received the goods. By the accepted law this liability of a first carrier continues until the first carrier has deposited the goods where the second carrier receives them, and given notice, as would generally be requisite, to the succeeding carrier that the goods were there awaiting his transportation, together with the necessary instructions for forwarding the goods. If, however, the second carrier finally refuses the goods, the first carrier has performed its duty as such. But there rests upon it in this case, as in many other cases of unexpected interruption,

the duty to store the goods refused and notify the consignor of the situation.

TERMINATION OF THE BAILMENT

It would seem that completion of performance, according to the instruction given by the person entitled to give directions, would always be a termination of the carrier's responsibility in the absence of complicating circumstances. Thus delivery to the consignee would normally be a discharge from all further liability; and so would delivery to the consignor be, if title has not passed to the consignee. Where a bill of lading is issued, delivery according to its tenor will usually be considered performance of the undertaking; and therefore it is often said that the carrier may require the production of the bill of lading before he can be asked to deliver the goods. A distinction should be taken, however, which is not invariably observed. A carrier who has issued an "order" bill of lading delivers the goods to anyone else than the holder of the bill of lading at his peril, as the commercial community deals with such bills as representing the goods themselves. But it is usually held otherwise as to the "straight" bill of lading, for it would be hampering business too much to hold the carrier liable for delivering to the addressee without his producing the bill.

It is a good defense to an action upon the contract for transportation against a common carrier by a party to the consignment, if the carrier shows that it delivered the goods to the true owner. Indeed, it is liable for conversion if it refuses to surrender the

goods to the true owner upon demand. It may be noted that if the owner demands his goods at any place, he is entitled to have them; but he must pay the freight for the whole carriage originally arranged. The consignee may, however, accept delivery in a different place at an earlier time from what is usual; and by such acceptance a delivery may be made good when tender merely would have been bad. And the existence of a customary mode of delivery may be sufficient to justify the carrier in delivering in a certain manner which would otherwise be unusual.

RESPONSIBILITY FOR MISDELIVERY

Such is the responsibility of bailees, that delivery by the carrier to a person other than the person designated is a misdelivery for which the carrier is absolutely liable as for a conversion. Misdelivery, indeed, is a deviation from the undertaking; and the carrier is therefore held liable for loss resulting therefrom, even if there is no negligence that can be imputed to him. But if the negligence of the shipper is a factor in the mistake, then the carrier is excused, as where the address of the consignee is so wrong as naturally to mislead the carrier. Furthermore, delivery to an unauthorized person is misdelivery, while delivery to an agent with apparent authority to receive is good. It is, for example, not good delivery to hand the goods over to a wife or an associate. But it is good delivery to hand a package addressed to an officer to the clerk in his office, or in care of the conductor of a train to whomsoever may be the conductor at the time.

There is a class of cases, as to which it is difficult to come to a conclusion, where delivery of goods is made to an imposter. In these cases the usual fact is that the imposter has ordered goods by mail, using the name of a reputable firm with a commercial rating. The goods are forwarded in response to this order, and the imposter who is there ready to receive them gets them from the carrier. There are courts which consider this to be a misdelivery and hold the carrier liable for the consequent loss of the goods. But by what seems to be the better opinion, it is held that the carrier is in reality delivering in response to the instructions of the shipper whatever be the fraud which induced the consignment. It should be said that in these cases as in others, if there is a suspicion plainly pointing to fraud, the carrier would be negligent in making delivery. As in all other cases of bailment the carrier owes the parties in interest the utmost fidelity in all circumstances.

SPECIAL LIMITATION OF LEGAL LIABILITY

The carrier is allowed by contract with the shipper to exempt himself from his common law liability as an insurer, provided that mutual assent and consideration sufficiently appear in the transaction by the acceptance of the bill of lading and the quoting of a lower rate. But even although the contract is sufficient in these essentials, it is held against public policy if the carrier attempts to press the shipper further. It may well be that the abnormal liability of an insurer which the law imposes upon the carrier may be cut down by special arrangement. But it

would seem to be against public policy for a public servant to stipulate that he shall not be liable for his negligence in the performance of his undertaking. And as a matter of fact this distinction will be found to be supported by an almost overwhelming weight of authority.

The most important point in relation to the limitation of liability is that the exceptional liability, such as that making the common carrier of goods liable as an insurer, may be done away with by a special contract properly made. By the overwhelming weight of authority, it is conceded that a contract which goes no further than this is not against public policy. As the carrier is still held liable for any negligence that may be found in him, it is enough. A contract which only relieves from liability a carrier who has exercised the utmost human foresight certainly cannot be said really to tend in any way to impair that efficiency which is so requisite in a public service. If there ever was any reason for the earlier law, making the carrier liable when he was not blameworthy, the necessities for any such law ceased before it had really become law. According to modern notions of responsibility, there is almost never reason enough to make a party to whom no fault can be attributed liable for a loss.

On the other hand, by the great weight of authority a contract that the shipper will not hold the carrier liable for loss or damage caused by its negligence or that of its servants is held against policy. The real reason for this is that if such contracts were permitted there would be an inevitable deterioration in

the public service. Indeed, that the invalidity of such exemptions is due to the character of the service is shown by the fact that when the matter under contract does not directly pertain to the public service as such, the contract is held valid. As the United States Supreme Court said in the leading case, the proposition to allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions that are unreasonable and improper, amounting to an abdication of the essential duties of his employment, would never have been entertained by the sages of the law.

Stipulations limiting the recovery to an agreed amount in case of loss by negligence do not necessarily tend to defeat public service, and therefore are not held against public policy by the great majority of cases. The amount must not be nominal, but it need not necessarily be actual. If a sufficient sum to secure due care is stated, that is enough to avoid the condemnation of the law. There are no considerations of a sound public policy which require that such contracts should be held invalid, or that a person, who in such contract fixes a value upon his goods which he intrusts to the carrier, should not be bound by that valuation. And such limitation of liability to a set amount has during the past few years repeatedly been held valid by the Supreme Court of the United States, even when as in such special legislation as the Carmack Amendment, it is provided that the carrier shall not stipulate against liability for loss.